IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 738 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

POSHALAYABHAI JIVALYA DESHMUKH - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
THROUGH JAIL for Appellant(s) : 1,MR BS SUPEHIA for Appellant(s) : 1,MS FARHANA Y MANSURI for Appellant(s) : 1,
PUBLIC PROSECUTOR for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 13/06/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant came to be tried by the Sessions Court, Valsad at Navsari in Sessions Case No.166 of 1999 for the murder of his real brother Jagubhai Jivalya allegedly committed by him on 19.10.1999 at about 4.30 hours in the morning in front of the house of the deceased located in Khora falia of village Boriachh by inflicting axe blows on chest and other parts of the body. The Sessions Court, after considering the evidence led by the prosecution, concluded that the prosecution was successful in establishing the charge against the appellant and convicted the appellant accused under Section 302 of Indian Penal Code sentencing him to undergo imprisonment for life and to pay fine of Rs.2,000/-, in default, to undergo simple imprisonment for two years. Aggrieved by the said judgment and order, original accused convict has preferred this appeal.

2. The appellant is represented by learned advocate Ms.F.Y.Mansuri and the respondent State is represented by Mr.Bhate learned APP.

3. Ms.Mansuri submitted that the appellant is alleged to have committed murder of his full blood brother and the motive attributed is the property dispute, but in fact the dispute was settled about two years prior to the incident and thereafter, there

was no dispute, quarrel or even altercation between two on this ground. The motive attributed is therefore, very stale.

3.1 Ms.Mansuri submitted further that the FIR is lodged late by four and half hours and no reasonable explanation is tendered therefor.

3.2 It is contended by Ms.Mansuri that there is discrepancy in the evidence of recovery of weapon. There is evidence to show that the accused produced the weapon. Contrary to this, there is evidence to show that the weapon was brought by the village people and panchanama of recovery is silent on the origin of recovery of weapon. Ms.Mansuri submitted further that there is discrepancy in description of the bed-sheet recovered from the place of incident as given in the panchanama and description as given in the FSL report.

3.3 Ms.Mansuri submitted that there is discrepancy in the number of injuries recorded in the inquest panchanama and the postmortem report. She submitted that the witnesses examined are relatives of the deceased and are interested witnesses. No independent witness is examined by the prosecution.

3.4 Ms.Mansuri submitted that the trial Court overlooked this aspect while recording the conviction. The discrepancy will create serious doubt in the prosecution case and the benefit of serious

doubt ought to have been given to the appellant.

3.5 Ms.Mansuri submitted further that the evidence about availability or non-availability of light at the place of incident is inconsistent and if there was no light, possibility of mistake in identifying the assailant cannot be ruled out and the benefit may be given to the accused. She, therefore, submitted that the appeal may be allowed.

4. Learned A.P.P.Mr.Bhate submitted that the incident has occurred at about 4.30 a.m., in the morning in front of the house of the deceased. At this odd hours, independent witness cannot be expected to be present and the presence of the witnesses examined is quite natural. The version of the eye witnesses does not suffer from any defect which would render the deposition doubtful.

4.1 Mr.Bhate submitted that motive is only one of the circumstances, but when there is direct evidence of eye witnesses, absence of motive or staleness of motive would pale into insignificance. Mr.Bhate submitted that when the bed-sheet was recovered, it has come in the evidence that it was properly sealed. It has also come in the evidence that when it was received by the FSL, the seal was found intact and as such, there is no scope for any tampering. The discrepancy in description may be because of different persons describing in different manner. It is clear from the description recorded in

the panchnama that bed-sheet contains multiple designs and, therefore, this mistake may have occurred, but when it is found that it was sealed at the time of recovery and that the seal was found intact by the FSL, this discrepancy or difference in description of bed-sheet cannot be given importance.

4.2 Mr.Bhate submitted that panchnama of place of incident is silent on the presence or absence of light. The Investigating Officer says that he did not notice if there was light at the place of incident, but it has come in the evidence of panch witness of the place of incident panchnama that there was light in the house of the deceased and, therefore, it cannot be said that evidence in this regard is contradictory or inconsistent.

4.3 Mr.Bhate submitted that, there is consistent evidence led by the prosecution and, therefore, as the trial Court has rightly recorded conviction, the appeal may, therefore, be dismissed.

5. We have examined the record and proceedings in light of the submissions made by the rival sides.

6. It is not in dispute that the deceased met with homicidal death. The deceased had sustained multiple injuries on various parts of the body and the postmortem note Exh.26 indicates as many as 7 external injuries. According to the Doctor, cause of death was shock as a result of intra-cranial

hemorrhage and right temporal bone fracture, the head injury with corresponding injury to brain. There was injury on chest with corresponding internal injury. These injuries could not have been caused by an accident nor could they have been self inflicted. The injuries have been opined by the Doctor to be sufficient in ordinary course to cause the death and have in fact caused the death of the deceased. Under the circumstances, we find the trial Court was justified in concluding that the deceased met with homicidal death.

7. The prosecution has examined Bhanuben Jagubhai and Jasodaben Jagubhai as eye witnesses to the incident.

8. Bhanuben has deposed at Exh.12. She is the wife of deceased Jagubhai Jivalya. She deposed about the dispute between her husband and the appellant accused because of landed property and that the appellant was not even in speaking terms with her husband and another brother. She says that incident occurred on the day of Dashera. When the appellant caused injuries to the deceased with axe, there was full light and that witness, her daughter and deceased husband were sleeping in front of the house on Ota. She was awakened by the sound of assault by axe and she saw that the appellant was inflicting axe blows on her husband. She was not sure as to how many blows were given, but she at least noticed 3 to 4 blows were given by the appellant to the deceased.

She therefore, raised alarm. Her children were also awakened and the appellant ran away along with axe. The deceased was bleeding profusely and his clothes were blood-stained and was taken to Vansda Hospital and therefrom to Surat Hospital. The witness says that she was able to identify axe which was used by the appellant in commission of the offence. The witness says that muddamal article No.2 was not axe which was used in commission of the offence.

8.1. The witness is cross examined at length. She admits that the land dispute was resolved by the panchas. She, while denying the suggestion, says that after the land dispute was resolved, there was no dispute between the brothers but the accused appellant was not even speaking to her husband. The appellant was not visiting her house. She says that her daughter and Gajendra also woke up immediately on her sound on infliction of blows with axe. She denied the suggestion that incident was not seen by her daughter or Gajendra.

9. Witness Jasodaben Jagubhai is examined at Exh.13. She is the daughter of deceased. She also deposed on the same line as her mother Bhanuben about the incident except that she identifies muddamal article No.2 axe as an axe which was used by the appellant in causing injuries to the deceased. She is also cross examined by the defence but nothing turns on her cross-examination.

10. The depositions of these eye witnesses clearly establish involvement of the appellant in the offence for which he is convicted. Their presence at the time of incident is natural. It would be unreasonable to expect presence of an independent witness in wee hours of the day at the place of incident. As to absence of light and likelihood of mistake in identifying the assailant, it may be recorded that the witnesses and the accused appellant are close relatives. It has come in the evidence of Bhanuben that the deceased was reading during the night meaning thereby that there was electric connection and light in the house of the deceased. That apart, it has come in the evidence that the incident has occurred on Dassehra and, therefore, there would be moon light. The villagers are used to see in the night and possibility of mistaking a known close relative, therefore, gets ruled out. The motive also cannot be considered as a stale one because though the dispute was settled at the intervention of the panchas, the accused appellant continued to nurture grievance against the deceased. This conclusion is founded on the evidence that even after the settlement of the land dispute at the instance of the panchas, the appellant never spoke to the deceased or his family members nor did he ever visit the house of the deceased. Therefore, it cannot be accepted that motive attributed is on stale facts.

11. There is nothing to doubt testimonies of two eye witnesses which are corroborated by other pieces

of evidence. The motive also gets properly established.

12. So far as other discrepancies pointed out by the learned advocate for the appellant are concerned, we find that there some discrepancies in description recorded in the panchnama of recovery of bed-sheet and description of bed-sheet given in the FSL report, but at the same time, we also find that when bed-sheet was recovered, it was properly sealed in the presence of the panch witnesses. It has also come in the evidence that when it was received by the FSL, it was received with the seal intact. As such, there was no scope for any tampering. The bed-sheet is found contain blood of the group of the deceased. The discrepancy in description has to be ignored in view of the fact that when it was recovered, it was sealed and when it was received by the FSL, the seal was intact.

13. So far as the discrepancy in number of injuries on the person of the deceased is concerned, it is true that inquest panchnamna speaks of 5 injuries, whereas postmortem note speaks of 7 injuries. It cannot be overlooked that postmortem is performed by the Medical Expert who would examine the dead body thoroughly and record injuries whereas inquest panchnama is drawn in the presence of the lay-man civilian who might have missed one injury or the other or to get such injury recorded. It is nobody's case that any incident occurred between the

drawal of inquest panchnama and performance of the postmortem which can be attributed the causation of injury. Therefore, there is no such discrepancy which would raise reasonable doubt in the prosecution story.

14. It was contended that the FIR is lodged late by 4 1/2 hours, but when we see the evidence, we find that the FIR is given by the person other than the eye witness. It has also come in the evidence that, immediately after the incident, the deceased was sought to be taken to the hospital at Vansda and therefrom he was taken to Surat. This must have consumed some time and, therefore, lapse of four and half hours in lodging the FIR cannot be considered as fatal to prosecution.

15. In light of the foregoing discussion, we are of the view that the trial Court was justified in convicting the appellant for the offence of murder. As the prosecution successfully proved the case against the appellant to the guilt, no interference is called for in the judgment of the trial Court. We are in the broad agreement with the reasoning recorded and the conclusion arrived at by the trial Court. The appeal, therefore, must fail.

16. The appeal is dismissed. The judgment and order passed by the Sessions Court, Valsad at Navsari on 7.7.2000 in Sessions Case No.166 of 1999 is hereby confirmed.

(A.L.DAVE, J)

(SHARAD D DAVE, J)

pathan